89-955

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

GRETA MEYER and JOHANNE ROHDE, PETITIONERS,

vs.

JOHN FOWLER AND DIANE FOWLER, RESPONDENTS.

On a Writ of Certiorari from the Court of Appeal of the State of California, Fourth Appellate District, Division Two.

PETITION FOR CERTIORARI

ALTHOUSE & BAMBER
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QUESTIONS PRESENTED

Does California Code of Civil Procedure Section 351, enacted in 1872, prior to modern long-arm statutes, violate the United States Commerce Clause, by treating residents of New York, who own and lease real property and improvements located in California, in a discriminatory manner, as compared to California residents, who own and lease real property located in California, thereby burdening commerce, by tolling any and all California statutes of limitations in perpetuity against all nonresidents engaged in leasing their real property and improvements in California.

PARTIES TO THE PROCEEDING BELOW

All parties in the caption of the case in the United States Supreme Court.

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Counsel for Petitioners

OPINIONS BELOW

The California Supreme Court denied Petition for Review on August 24, 1989. A copy of the Order denying review is attached hereto as Appendix A on page A-1.

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division 2, is attached hereto as Appendix B beginning on page A-2.

JURISDICTION

On August 24, 1989 the California Supreme Court entered its order denying Appellants' Petition For Review after Judgment by the Court of Appeal.

The Opinion of the Court of Appeal, printed in Appendix A, attached hereto, which Petitioner seeks to have reviewed, is dated June 12, 1989. The Opinion was an unqualified reversal of the Superior Court

Judgment and was entered upon remittitur on August 28, 1989.

On June 27, 1989, the Court of Appeal of the State of California, Fourth Appellate District, Division 2, had denied both Appellants' and Respondents' Petitions for Rehearing.

As the California Supreme Court denied Appellants' Petition for Review on August 24, 1989, the jurisdiction of this court is evoked under Section 1257(a) of Title 28 of the United States Code.

There is a present case and controversy in that the Court of Appeal granted an unqualified reversal without directions as to further proceedings in the Trial Court in the pending case. In addition, Plaintiffs, on our about September 28, 1989, filed an additional lawsuit against Petitioners herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 8 [3]:

[The Congress shall have power] [3] To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes;

[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Offices thereof.

United States Constitution, Article VI [2]:

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every States shall be bound thereby, any Thing in the

Constitution or Laws of any State to the Contrary not withstanding.

California Code of Civil Procedure Section 351:

EXCEPTION, WHERE DEFENDANT IS OUT OF THE STATE.

If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.

STATEMENT OF CASE

The Superior Court of San Bernardino County, State of California, granted Judgment in favor of Plaintiffs, JOHN and DIANE FOWLER'S Complaint for specific performance of an oral contract to purchase 10 acres of real property and improvements located in Etiwanda, California. The

Superior Court denied Defendants GRETA MEYER and JOHANNE ROHDE'S Cross-Complaint for quiet title and ejectment. The action was tried without a jury. The Superior Court filed a Statement of Decision on April 27, 1989. Defendants filed a Request For Statement of Decision and request for additional items to be covered in Statement of Decision on May 7, 1987. Defendants filed Objections to Statement of Decision on May 12, 1987. The Superior Court entered its Judgment on June 30, 1987.

Defendants GRETA MEYER and JOHANNE ROHDE filed a Notice of Appeal on August 4, 1987. Defendants-Appellants filed an opening brief. Respondents filed a responding brief. Appellants filed a reply brief. By letter dated March 9, 1989, the Court of Appeal, Fourth Appellate District, Division 2, requested that the parties submit letter briefs addressing whether the issue of the statute of limitations was

preserved for appellate review and whether California Code of Civil Procedure Section 351 operated to toll the statute of limitations against nonresidents. The parties both submitted letter briefs addressing the issues to the court. In their Letter Brief Requested By Court, Appellants, Petitioners herein, raised the issue that the application of California Code of Civil Procedure Section 351 against nonresident owners of California property engaged in interstate commerce violated the Commerce Clause of the United States Constitution.

In the opinion of the Court of Appeal, attached hereto in Appendix "A", the Court of Appeal discussed the issue of the Statute of Limitations at pages 8 through 11 of the Opinion. The Court of Appeal held that if the California Code of Civil Procedure Section 351 did not apply, then the Plaintiff's action was barred by the

Statute of Limitations under California Code of Civil Procedure Section 339. However, the Court of Appeal held that Section 351 tolled the Statute of Limitations when the Defendant is a nonresident.

On page 9, in footnote 2, the Court of Appeal held that the issue of the Statute of Limitations was preserved for appeal as an issue of law. However, the Court of Appeal Opinion, and the cases cited therein as authority, did not mention or address the issue that application of California Code of Civil Procedure Section 351 discriminates against nonresidents engaged in interstate commerce and burdens the flow of interstate commerce.

Petitioners presented the issue that California Code of Civil Procedure Section 351 violates the Commerce Clause to the Court of Appeal on pages 5 through 15 of the Appellants' Letter Brief Requested By Court, and more particularly, at pages 13 through

15 therein. Also, the Petitioners presented the issue to the Court of Appeal at pages 1 through 7 of Appellants' Petition For Rehearing filed on June 19, 1989.

The Opinion of the Court of Appeal did not mention or address the issue that the California Code of Civil Procedure Section 351 violates the Commerce and Supremacy Clauses in this case.

On June 27, 1989, the Court of Appeal denied both the Appellants' and the Respondents' Petitions for Rehearing. The Opinion of the Court of Appeal reversed the Judgment of the Trial Court on the basis of laches and the Statute of Frauds. At pages 8 through 11 of the Opinion, the Court of Appeal had held that if the Code of Civil Procedure Section 351 did not apply, the Plaintiffs' action was barred by the Statute of Limitations. However, the Court of Appeal held that Section 351 tolled the Statute of Limitations. Therefore, although

the Superior Court Judgment was reversed on the basis of laches and Statute of Frauds, Appellants requested the rehearing on the basis of one issue that the application of 351 violated the Interstate Commerce Clause.

When the Court of Appeal denied rehearing without addressing the issue of the Commerce Clause, Appellants, Petitioners herein, filed a Petition for Review in the Supreme Court of the State of California raising the issue that California Code of Civil Procedure Section 351 violated the Commerce Clause of the United States Constitution. On August 24, 1989, the Supreme Court of the State of California denied Appellants' Petition for Review without addressing the issue that the application of California Code of Civil Procedure Section 351 violated the Commerce Clause of the United States Constitution.

The application of California Code of Civil Procedure Section 351 by the Courts of

the State of California to toll the Statute of Limitations in perpetuity against the Petitioners herein, who have resided and continue to reside in New York, subjects Petitioners to defending claims which would be barred if Petitioners were residents of California engaged in leasing their real property and improvements to the Plaintiffs.

Therefore, Petitioners have filed this Petition For Writ of Certiorari with the United States Supreme Court to prevent discrimination against nonresidents engaged in interstate commerce and to prevent the burdening of interstate commerce.

REASONS FOR ALLOWANCE OF THE WRIT

The decision of the California Court of Appeal was incorrect in holding that California Code of Civil Procedure Section 351, enacted in 1872 prior to modern long-arm statutes, tolled the Statute of Limitations against nonresident landowners

leasing their real property located within the state of California. The application of section 351 under such facts is repugnant to the Commerce Clause of the constitution. The application of section 351 is discriminatory on its face and an impermissible burden on commerce. The discrimination against nonresident landlords and the burden on interstate and California commerce is a significant legal and public policy issue worthy of review by this Court. Under the Supremacy and Commerce Clauses of the United States Constitution, the issue warrants review.

Enacted in 1872, prior to modern long-arm statutes, California Code of Civil Procedure provides as follows:

> "EXCEPTION, WHERE DEFENDANT IS OUT OF THE STATE. If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his

> absence is not part of the time limited for the commencement of the action."

The Opinion of the Court of Appeal discussed the issue of the Statute of Limitations at pages 8 through 11 of the Opinion. The Court held that if the Code of Civil Procedure Section 351 did not apply, the Plaintiffs' action was barred by the Statute of Limitations under California Code of Civil Procedure, Section 339. However, the Court of Appeal held that Section 351 tolled the Statute of Limitations when the Defendant is a nonresident. As authority, the Court of Appeals cited Kohan v. Cohan, 204 Cal.App.3d 915, 921 (1988), Dew v. Appleberry, 23 Cal.3d 630, 637 (1979); G.D. Searle & Co. v. Cohn, 455 U.S. 404, 412, 102 S.Ct. 1137, 71 L. Ed.2d 250, 258 (1982). See Court of Appeal Opinion at page 10.

However, the Court of Appeal Opinion, and the cases cited therein as authority, did not address the issue that application

of Section 351 violates the Commerce Clause. The cases cited by the Court of Appeal support its ruling that Section 351 can withstand attack on equal protection grounds, but do not address the Commerce Clause. The United States Supreme Court remanded on the Commerce Clause issue. See G.D. Searle & Co. v. Cohn, 455 U.S. 404, 102 S.Ct. 1137, 71 L.Ed.2d 290 (1982).

The issue of the tolling of Section 351 was presented to the Court of Appeal at pages 5 through 15 of Appellants' Letter Brief Requested By Court, and more particularly, at pages 13 through 15 therein. In addition, the issue was presented to the Court of Appeal at pages 1 through 7 of the Appellants' Petition for Rehearing filed on June 19, 1989. The California Supreme Court denied a Petition for review on August 24, 1989.

On page 10 of its Opinion, the Court of Appeal held that the only time Section 351

would not toll the statute of limitations against a nonresident Defendant is when the Plaintiffs' action is in rem and does not require personal jurisdiction over the defendant in order for the Court to proceed. Ridgway v. Salrin, 41 Cal.App.2d 50 (1940). The Court of Appeal held that Plaintiffs' action for specific performance and/or damages was not an action in rem, but rather required the Court's personal jurisdiction over Defendants.

Appellants had argued in their Letter Brief Requested By Court that the action involving the subject real property was an action in rem under California Code of Civil Procedure Section 760.010 et seq. The Trial Court could have granted Plaintiff relief by quieting title in Plaintiffs, without having personal jurisdiction over the Defendants. Personal jurisdiction of the Defendants was not necessary for the Trial Court to have jurisdiction to quiet title in

Plaintiffs if Defendants failed to respond to the Complaint. The land which was the subject of the alleged oral contract was located within the State of California. Therefore, since the Court could have quieted title in the subject property in Plaintiffs, the action truly was an action in rem. Accordingly, Section 351 should not toll against the nonresident owner landlords of real property within California under Ridgway v. Salrin, 41 Cal.App.2d 50 (1940).

In addition, the Defendant landlords had sufficient minimum contacts with California to subject them to quasi in rem jurisdiction at the accrual of Plaintiffs' action. At page 11 of its Opinion, the Court of Appeal held that Section 351 tolled the Statute of Limitations against nonresident owner landlords of real property, notwithstanding the fact that Defendants had sufficient minimum contacts

for the imposition of personal jurisdiction and were amenable to service. The Court cited Dew v. Appleberry, 23 Cal.3d 630 (1979).

However, the case of Dew v. Appleberry did not involve the issue of the Commerce Clause. When reviewing the application of statutes such as Section 351 under the Commerce Clause, the Court is required to subject the inquiry to much stricter scrutiny. Under such strict scrutiny, the fact that the Defendants had sufficient minimum contacts for the imposition of personal jurisdiction and were amenable to service becomes important in the analysis, as discussed below. The Court must balance the discrimination or burden upon interstate commerce against the significant interest of the state.

The decision of the Court of Appeal did not discuss the application of the United States Supreme Court case of Bendix

Autolite Corp. v. Midwesco Enterprises, 486 U.S.___, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988). The Bendix case was cited in both the Appellants' Letter Brief Requested By Court and the Appellants' Petition for Rehearing.

In the Bendix case, the United States Supreme Court held that an Ohio law which tolled the statute of limitations period against a foreign corporation which did not consent to the jurisdiction of the Ohio Courts placed an unreasonable burden on interstate commerce in violation of the Commerce Clause. The United States Supreme Court held that although state interest may be legitimate for purposes of equal protection or due process analysis, such state interest may be insufficient to withstand commerce clause scrutiny. Id. 486 U.S. at ___, 108 S.Ct. at 2221-2222, 100 L.Ed.2d at 903-904.

Under the Bendix case, scrutiny under the Commerce Clause requires the Court to first assess the State interest in protecting its citizens. Then the Court should balance the State interest against the discrimination imposed upon a nonresident owner/landlord leasing real property to tenants in California, together with the undue burden upon interstate commerce should Section 351 toll the statute of limitations in perpetuity. The Supremacy Clause requires the application of the strict scrutiny analysis. U.S. Constitution, Article VI.

Appellants were engaged in interstate commerce. Appellants were renting their California real property to California tenants. The California tenants were utilizing the 10 acres of land and structures to keep chickens, other animals, to farm, and to store cars. The relationship between the landowners and the

tenants constituted interstate commerce. The uses to which the tenant utilized the real property constituted intrastate commerce and therefore, in turn, affected interstate commerce. Intrastate commerce can itself affect the flow of interstate commerce. See Wickard v. Filburn, 317 U.S. 111, 63 S. Ct. 82, 87 L.Ed. 122 (1942); Atlanta Motel v. United States, 379 U.S. 241, 85 S. Ct. 348, 13 L.Ed. 258 (1964).

Under the facts of the instant case, the tolling of Section 351 violates the Commerce Clause. The State of California is discriminating against nonresident owners leasing their real property to California tenants. The State of California is treating nonresident owners leasing real property within the State in a different manner as it is treating in-State property owners. The discrimination is based solely on nonresidence. While such a discriminatory application of the statute

may withstand scrutiny under the Equal Protection Clause, the Commerce Clause requires stricter scrutiny. Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. ____ _, 108 S. Ct. 2218, 100 L. Ed.2d 896 (1988).

As applied to the case at hand, California Code of Civil Procedure Section 351 is discriminatory on its face and also places an impermissible burden on commerce. Such an application of Section 351 is invalidated under the Supremacy Clause. U.S. Constitution, Article VI.

Under the Bendix case, the United States Supreme Court analysis requires a balancing approach. The Commerce Clause analysis requires the Court to balance the state's legitimate interest in protecting its residents from defendants who become liable for acts done within the State, but later withdraw from the jurisdiction, against the burden on interstate commerce caused by subjecting a nonresident

owner/landlord to lawsuits in perpetuity. In the instant case, defendants, petitioners herein, were not California residents, but were New York residents, who leased their California property to Plaintiffs.

Under the strict scrutiny required by the Commerce Clause, the State of California cannot demonstrate a significant state interest in protecting its residents. The defendants herein, GRETA MEYER and JOHANNE RHODE, have been New York residents and could have been served with process in New York under the long arm statute throughout the period of limitations.

In the Bendix case, the United States Supreme Court held that an Ohio law tolling the Statute of Limitations violated the Commerce Clause. The Ohio Law tolled the Statute of Limitations for any period that a person or corporation was not "present" in the State. The Ohio Statute required that a foreign corporation, in order to be

"present" in Ohio, had to appoint an agent for service of process, which appointment operated as a consent to the general jurisdiction of Ohio courts. Therefore, the United States Supreme Court held that the state law violated the commerce clause because it subjected the foreign corporation to service of suit, even in cases in which the foreign corporation did not have minimum contacts with the State of Ohio.

In utilizing the balancing approach in the instant case, the holding and supporting language of the Bendix Opinion is applicable. An analysis of the Bendix Opinion demonstrates that the State of California cannot demonstrate that its legitimate sphere of regulation is much advanced by the application of Section 351 in the instant case, while on the other hand interstate commerce is subject to substantial restraints.

In analyzing the application of Section 351, under the Commerce Clause, an inquiry regarding the legitimate interest of the State is essential. In this regard, the fact that the defendants in the instant case had sufficient minimum contacts for the imposition of personal jurisdiction and were amenable to service notwithstanding their absence from the State does become pivotal in the analysis. In fact, the United States Supreme Court in Bendix stated that the Ohio statute before the Court might have been held to be a discrimination against interstate commerce without extended inquiry. However, the Supreme Court instead chose to assess and discuss at length the interest of the State of Ohio. The purpose of the Court was to demonstrate that the burden imposed on interstate commerce by the tolling statute exceeded any local interest that the State might advance.

In the Bendix case, the United States Supreme Court held that the Ohio tolling statute violated the Commerce Clause. The Supreme Court stated as follows:

> "Ohio cannot justify its statute as a means of protecting its residents from corporations who become liable for acts done within the State but later withdraw from the jurisdiction, for it is conceded by all parties that the Ohio long-arm statute would have permitted service on Midwesco throughout the period of limitations." (emphasis added).

Bendix Autolite Corp. v. Midwesco Enterprises, 100 L.Ed. 2d at 904.

In the instant case, the State of California cannot demonstrate that there is any significant legitimate state interest to balance against the discrimination and burden on interstate commerce. Even assuming there is a rational relationship, in that it may [or may not] be to some degree potentially more difficult to serve a defendant out of state, the fact is that the defendants herein were amenable to service

and service was easily accomplished against them. In fact, to avoid the court granting relief of quieting title in plaintiffs, the defendants of course would wish to respond to the Complaint. In the instant case, the defendants were amenable to service as if they were "present" within the State of California. In many cases, it may even be easier to serve a well known defendant out of state than it would be to serve a defendant who is attempting to conceal himself or herself within the State of California.

Therefore, the State of California cannot demonstrate a significant State interest to withstand scrutiny under the Commerce Clause. Under the Commerce Clause analysis, the fact that the defendants had sufficient minimum contacts with California and were amenable to service is taken into consideration in the analysis. The California case of Dew v. Appleberry, 23

Cal. 3d 630 (1979), did not involve an analysis of the Commerce Clause.

Therefore, on the one hand, the State of California cannot demonstrate that there is any significant legitimate State interest to balance against the discrimination and burden on interstate commerce. On the other hand, the nonresident owners leasing real property to California tenants are subject to defending stale claims and are prevented from asserting that such claims are barred by the Statute of Limitations.

The nonresident owner/landlord leasing real property in California always has been and will be subject to service under the long arm statutes. The land located within California is subject to in rem jurisdiction under the Quiet Title Act. California Code of Civil Procedure Section 760.010 et seq. Yet the nonresident owner is forced to defend stale claims while the in-state owner

of real property is not. This application of Section 351 is discriminatory on its face.

California's disparate treatment against nonresident owners leasing real property to California tenants, as compared to in-state owners, places an undue burden upon interstate commerce. In-state property owners leasing property to tenants can assert the Statute of Limitations, but out-of-state landlords cannot.

The issue is significant. In the instant case, the defendants-appellants, Petitioners herein, were leasing their ten acres of land and improvements in Etiwanda, California to Plaintiffs. An out-of-state landlord may be leasing many large office buildings or many acres upon acres of real property and structural improvements to California tenants. The discrimination against out-of-state landlords and the burden upon interstate and California

commerce is a significant, legal and public policy issue worthy of review by this Court.

If out-of-state landlords are prevented from asserting ordinary legal defenses, such as the Statute of Limitations, while in-state property owners can assert such ordinary defenses, out-of-state landlords are encouraged to refrain from leasing their property. Instead, out-of-state property owners are encouraged to hold the property vacant as an investment. Such disparate treatment of nonresident property owners burdens the flow of interstate commerce. Tenants could not utilize the property for raising animals, crops, or storing automobiles, such as in the instant case, or the many other uses to which tenants utilize real property and improvements located within the State of California. In contrast, the State of California cannot assert a significant valid interest to

balance against such discrimination and burden upon commerce.

In the Bendix case, Justice Scalia concurred in judgment that the Ohio tolling statute violated the Commerce Clause. While Justice Scalia expressed the view that the balancing approach should be abandoned, Justice Scalia concurred because the Ohio statute discriminated against interstate commerce by applying a disadvantageous rule against nonresidents for no valid state purpose that required such a rule. Bendix Autolite Corporation v. Midwesco Enterprises, Inc., 486 U.S. ____, 100 L.Ed. 2d 896, 907, 108 S.Ct. 2218 (1988).

Under the Commerce Clause analysis of the majority opinion and Justice Scalia's concurring opinion in the Bendix case, it is clear that California Code of Civil Procedure Section 351 is not tailored narrowly to advance the legitimate purpose

of preserving claims. As Justice Scalia stated in Bendix:

> "A tolling statute that operated only against persons beyond the reach of Ohio's long-arm statute, or against all persons that could not be found for mail service, would be narrowly tailored to advance the legitimate purpose of preserving claims; but the present statute extends the time for suit even against corporations which (like appellee) are fully suable within Ohio, and readily reachable through the mails." Id. at 100 L.Ed. 2d at 907.

The defendants-petitioners in the instant case were fully suable within California and were readily reachable through the mails. The dispute involved the ten acres of real property located in Etiwanda, California.

Under both the majority opinion and Justice Scalia's concurring opinion in the Bendix case, the application of California Code of Civil Procedure Section 351, enacted in 1872 prior to modern long-arm statutes, violates the Commerce Clause by applying a

disadvantageous rule against nonresident landlords for no valid or significant state purpose that requires such a rule.

CONCLUSION

As the constitutionality of the state statute is in question, 28 U.S.C. Section 2403(b) may be applicable. This Petition for Certiorari is being served upon the California Attorney General in accordance with U.S. Supreme Court Rule 28(4)(c).

For the foregoing reasons, and on the authorities cited, Petitioners, GRETA MEYER and JOHANNE ROHDE, respectfully urge that this Court grant this Petition for Writ of Certiorari and determine on the merits the important questions of law at issue.

Petitioners respectfully request that the United States Supreme Court enforce the Commerce Clause and the Supremacy Clause of the United States Constitution under the strict scrutiny analysis and invalidate the application of California Code of Civil

Procedure Section 351, which treats nonresident landlords in a discriminatory manner from in-state landlords and thereby burdens interstate commerce.

DATED: December _____, 1989

Respectfully Submitted,

ALTHOUSE & BAMBER

By:_____
MELVIN J. GOLDBERG
Attorney for Petitioners

APPENDIX

APPENDIX A

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District,
Division Two, No. E004616
S011160

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

JOHN FOWLER Et Al., Respondents

v.

GRETA MEYER Et Al., Appellants

Appellants' petition for review DENIED.

[Filed August 24, 1989]

LUCAS
Chief Justice

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

APPENDIX B

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

JOHN FOWLER et al.,	)	E004616
	)	
Plaintiffs and Respondents,	)	(Super.Ct.
	)	NO.
v.	)	OCV34315)
	)	
GRETA MEYER et al.,	)	OPINION
	)	
Defendants and Appellants.	)	
	)	

[Filed June 2, 1989]

APPEAL from the Superior Court of San Bernardino County, William Pitt Hyde, Judge. Reversed.

Althouse & Bamber and Melvin J. Goldberg for Defendants and Appellants.

Law Offices of Robert D. Andrews and Deborah Mohr Walker for Plaintiffs and Respondents.

In this action, the court entered judgment in favor of plaintiffs for specific performance of an oral contract of sale of real property entered into between

plaintiffs as buyers and a Fred Rohde, as seller. Fred Rohde, who is now deceased, owned the property jointly with defendants. Specifically, Mr. Rohde, in joint tenancy with his wife, defendant, Joanne Rohde, owned an undivided one-half interest in the property and defendant Greta Meyer owned the other undivided one-half interest.

The court determined the decedent, on his own behalf and as agent for defendants, orally agreed to sell the property to plaintiffs for a total purchase price of $65,000, with $15,000 down and the balance to be paid in equal monthly installments for 15 years at 7% interest. The court also found plaintiffs had entered into possession of the property and had made substantial improvements on the property and therefore defendants were estopped to assert the statute of frauds. The court also found defendants were estopped to assert decedent's lack of written authorization

from them to act as agent for them to sell the real property.

FACTS

In 1963, defendants and decedent, New York residents, acquired a 10-acre parcel of land in Etiwanda, California. Defendants relied on Albert Harms, the defendant's brother who resided near the property, to assist them in renting the property and collecting the rents. In October of 1975, the then current tenant died.

In the fall of 1975, plaintiff, John Fowler, who was interested in acquiring a larger parcel of land, heard from his son that the property owned by defendants was vacant and possibly for sale. When Fowler went to see the property, he met Mr. Harms and told him of his interest. Mr. Harms explained that he did not own the property and only had authority to rent it. He also told plaintiff that his brother-in-law owned the property and was interested in selling

it. Mr. Harms gave plaintiff Fred Rohde's telephone number in New York.

When plaintiff first visited the property, the property was in a run-down condition and also appeared to have been vandalized. Windows and doors were missing, the roof on the house and the barn needed repairs, and the interior of the house needed considerable repairs. Mr. Harms advised plaintiff that the owners considering demolishing the house. Concerned the property might become further damaged and vandalized before he could arrange to buy the property, plaintiff asked Mr. Harms if he could rent the property at that time so he could protect it and begin repairs immediately while awaiting finalization of the purchase of the property. Mr. Harms agreed and plaintiff paid him $100 to secure the property.

Shortly thereafter, plaintiff spoke with decedent who confirmed his interest in

selling the property. At that time plaintiff and decedent discussed a sales price of $50,000 with $10,000 down. Decedent also indicated his willingness to carry back paper for the balance for 15 years at 7 or 8%. The conversation ended with decedent stating he would be in California in the near future and they could finalize the deal at that time.

Plaintiff began making repairs to the property which included replacing missing doors and windows, replastering the walls, replacing the electrical system, repairing the roof to the house and the barn, and replacing missing plumbing fixtures. In December of 1975 plaintiff moved onto the property. About that same time, Mr. Harms returned to the property with a month-to-month rental agreement which he requested plaintiff to sign. Plaintiff was concerned about defendants' being able to remove him from the property after all the work he was

doing to fix the place up and inserted language in the agreement to the effect that the lessor would not terminate the tenancy unless plaintiff failed to fulfill the rental agreement. Mr. Harms agreed to this additional language.

Plaintiff contended and the court so found that in May of 1977, a year and a half later, decedent came to California and met with plaintiff at the property. At that time decedent stated he realized the property was worth more than $50,000 and therefore wanted $65,000 for it. He also stated he would need $15,000 down payment instead of $10,000. Decedent was willing to carry the balance for 15 years at 7%. Plaintiff told decedent he only had $10,000 for the down payment but if decedent would give him some more time he could raise the additional $5,000. Decedent told plaintiff not to worry and that he would be coming back to California shortly and they could

sign the papers then and that this would give plaintiff time to raise the additional money. Decedent died on June 23, 1977.

When decedent did not return to California, plaintiff called his home in New York and spoke with Werner Meyer, the son of defendant Greta Meyer. Mr. Meyer advised plaintiff os decedent's death. Plaintiff told Meyer he was the man living on the Etiwanda property who had been negotiating a sale of the property with decedent. Plaintiff told Meyer that when things straightened out he would be back in touch with them to finalize the deal. Meyer told plaintiff that he didn't see any problem with that and that would be all right as soon as the legal situations were taken care of.

In early August of 1977, plaintiff received a letter from Hilda Donahue, the daughter of decedent and defendant Johanne Rohde, dated July 30, 1977, advising

plaintiff of her father's death. She also advised plaintiff she was the executor of her father's estate and had power of attorney from her mother and instructed plaintiff to send further rent checks to Albert Harms. Plaintiff responded on August 10, 1977, offering her his condolences and advising her of the agreement reached with her father on June 15, 1977. Plaintiff stated that he trusted the estate would honor the terms and conditions of the agreement.

In early October of 1977, plaintiff received a letter from Mr. Meyer stating he was responding to plaintiff's letter of August 10th. Meyer advised plaintiff his mother and his aunt, defendants herein, were considering plaintiff's offer to purchase the property but that they felt they needed more cash and were somewhat hesitant about a long-term purchase agreement. He also advised plaintiff his aunt would be visiting

California shortly and was planning on visiting plaintiff. Finally, Meyer advised him defendants were in touch with a real estate broker in Los Angeles who would be showing the property during the next few months and defendants appreciated his cooperation.

After receiving this letter from Meyer, plaintiff attempted to secure financing for the property. In that regard, he apparently wrote to Mr. Harms requesting more information about the property to provide to the lending company. Plaintiff's request was forwarded to Mr. Meyer who responded by indicating he would be happy to send the information to the lender if plaintiff would give him the name of the lender and representative. Meyer also advised plaintiff to send any additional correspondence in regard to the property to him as he would be representing his aunt and mother in any business transactions.

After receiving this letter from Meyer, plaintiff tried to contact Meyer on several occasions with no luck and eventually called Hilda Donahue. Plaintiff told her it looked like he was going to be able to supply the $65,000 cash that Mr. Meyer had requested. Mrs. Donahue advised plaintiff she did not recognize any deal between plaintiff and her father or any deal between plaintiff and Mr. Meyer. Thereafter plaintiff retained an attorney by the name of Pete Norton.

Thereafter the parties engaged in a series of letters, some through their respective attorneys. There was discussion of a purchase price of $75,000 but apparently no new agreement was reached. The court, in its statement of decision, characterized these communications and negotiations as an attempt on defendants' part to avoid the contract entered into between plaintiff and decedent. It does not appear there were any further negotiations

or communications regarding the sale after 1979.[1]

STATEMENT OF DECISION

In its statement of decision, the court determined that when plaintiff first assumed possession of the property it was on a rental basis until plaintiff could finalize a purchase of the property from decedent. The court specifically found that although plaintiff and decedent discussed a sales price of $50,000, there was no contract formed at that time. The court found, however, that plaintiff entered into possession and made substantial improvements in reliance on decedent's representations.

Decedent came to California in May of 1977 and at that time plaintiff and decedent agreed on a sales price of $65,000 with $15,000 down and the balance to be carried

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[1] It does appear, however, that defendants served plaintiff with a notice to quit the property and apparently attempted to dispossess plaintiff on a number of occasions prior to 1984.

by decedent. In June of 1977, plaintiff spoke with decedent by phone and the contract was reaffirmed. The court also specifically found decedent was authorized by defendants to sell the property and that the original dealing and change of position justified the waiver of the statute of frauds. The court also found that after decedent died, the heirs tried to get out of the deal by disavowing decedent's authority and by trying to change the sales price.

In its conclusion the court found a valid and enforceable contract was entered into between plaintiff and decedent in 1977 with a sales price of $65,000 and there were no sufficient laches to give defendants an excuse for nonperformance.

ISSUES

Defendants contend (1) the court erred in ruling the action as not barred by the statute of limitations; (2) the court erred in finding the action was not barred by the

equitable doctrine of laches; (3) the court erred in finding an oral contract was formed in May or June of 1977 and that the contract was enforceable notwithstanding the statute of frauds; and (4) the court erred in finding the contract was enforceable against defendants notwithstanding the absence of written authorizations from defendants to decedent to sell their interest.

STATUTE OF LIMITATIONS

Defendants contend the court erred in finding that the action is not barred by an applicable statute of limitations. The issue of statute of limitations was first raised by defendants in a demurrer to the complaint. In overruling the demurrer, the court relied upon Francis v. Colendich (1961) 193 Cal.App 2d 128 which held that when a buyer is in possession of real property under a contract of purchase, the statute of limitations does not begin to run as long as he remains in possession and does

not abandon the contract. The Francis court also stated this same rule applies to the question of laches. (Id. at p. 131.) Defendants raised the issue again in a motion for judgment on the pleadings which was also denied.[2]

We disagree with the trial court's determination that plaintiffs' possession of the property tolled the statute of limitations. In Francis v. Colendich, supra, 193 Cal.App.2d 128 the vendee in possession of the property had fully performed and thus held equitable title to the property. The vendor in essence held the legal title in trust for the vendee. The holding in Francis was based on the

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[2] Although the statement of decision does not address the statute of limitations issue, we believe the issue is nonetheless appropriately reviewed on appeal from the judgment. In the present case, the issue is one of law. The essential facts relevant to the issue are not disputed and the issue was properly preserved for appellate review by defendants' demurrer, affirmative defense and motion for judgment on the pleadings.

long-standing rule applied in actions by a beneficiary against a trustee that the statute of limitations does not begin to run until there has been a distinct and unequivocal repudiation of the trust by the trustee. (Hermosa Beach Etc. Co. v. Law Credit Co. (1917) 175 Cal. 496.) As applied in the case where the vendee is in possession pursuant to the contract and has fully performed, there is no effective repudiation of the trust until there is an actual taking of possession of ouster. (Ibid.)

This is not the situation here. First, plaintiffs were not placed in possession of the property pursuant to the contract but rather were in possession of tenants. More importantly, plaintiffs have not fully performed and thus are not the owners of the equitable title. Accordingly, cases requiring an actual taking of possession for an effective repudiation of the trust to

start the limitations period are not applicable. In this case it is clear defendants breached and totally repudiated the contract more than two years before the filing of the present action. Accordingly, if Code of Civil Procedure section 351 does not apply, plaintiffs' action is barred by the statute of limitations. (Code Civ. Proc., Section 339.)

Section 351 in essence provides if a defendant is absent from the state when the cause of action accrues, the statute of limitation does not begin to run until the defendant returns. This statute has been applied consistently to toll the statute of limitations when the defendant is a nonresident when the cause of action accrued; in such case the statute commences to run only when the defendant enters the state. (See Kohan V. Cohan (1988) 204 Cal.App.3d 915, 921 and cases cited therein.) Moreover the section has

withstood constitutional attack on equal protection and other grounds. (Id., at p. 923; Dew v. Appleberry (1979) 23 Cal.3d 630, 637; see also G.D. Searle & Co. v. Cohn (1982) 455 U.S. 404, 412 [71 L.Ed.2d 250, 258, 102 S.Ct. 1137].)

The only time section 351 will not toll the statute of limitations against a nonresident defendant is when the plaintiff's action is in rem and does not require personal jurisdiction over the defendant in order for the court to proceed. (Ridgway v. Salrin (1940) 41 Cal.App.2d 50.) Plaintiffs' action for specific performance and/or for damages was not an action in rem but rather required the court's personal jurisdiction over defendants. (See 2 Witkin, Cal. Procedure (3d ed. 1985) Jurisdiction, Section 80, page 449.) Accordingly, in order for the court to render relief, personal jurisdiction over defendants was necessary. The fact that

defendants had sufficient minimum contacts for the imposition of personal jurisdiction and were amenable to service notwithstanding their absence from the state does not defeat the applicability of section 351. (Dew v. Appleberry, supra, 23 Cal.3d 630.) Accordingly, plaintiffs' action is not barred by the statute of limitations.

LACHES

In its statement of decision, the court found there was no sufficient laches to excuse defendants' nonperformance. This statement, which is actually found in the court's conclusion, finds no factual support in either the court's decision or the record.

"Ordinarily laches is a question of fact. [Citation.] Whether laches has occurred in a particular case presents a question primarily for the trial court, and an appellate court will not interfere with a trial court's discretion in this respect

unless it is obvious that manifest injustice has been done or unless its conclusions do not find substantial support in the evidence. [Citation.]" (Chang v. City of Palos Verdes Estate (1979) 98 Cal.App.3d 557, 563.) The basic elements of laches are an omission to assert a right, a delay in the assertion of the right for some appreciable period of time, and circumstances that would cause prejudice to an adverse party i assertion of the right were permitted. (Getty v. Getty (1986) 187 Cal.App.3d 1159, 1170.) It requires both unreasonable delay by plaintiff and prejudice to defendant. (Hill v. Hattrem (1981) 117 Cal.App.3d 569, 573-574, fn.3.) It may be successfully invoked even though the lapse of time is less than the applicable statute of limitations. (Holt v. County of Monterey (1982) 128 Cal.App.3d 797, 801.)

Here, we have no problem upholding a finding that plaintiffs' delay from 1977 through 1979 was not unreasonable. During this time period, plaintiffs tried, albeit unsuccessfully, to complete the transaction without resort to litigation. While defendants' conduct clearly put plaintiffs o notice that they did not intend to honor the contract entered into with decedent, their conduct also led plaintiffs to believe that a new contract might be feasible. It was not unreasonable for plaintiffs to refrain from filing suit during this time. Moreover, defendants cannot establish any prejudice resulting from this delay.

On the other hand, we find no evidence to support a finding that the delay from 1980 to 1984 was reasonable. Indeed plaintiffs offered no explanation as to why, after it was clear defendants were not willing to sell the property to them, they did not pursue an action at that time.

Plaintiffs did not explain why their earlier action filed in 1979 was not served or in any way pursued and why they continued to live on the property and continued to pay rent, without seeking a court determination on their contractual rights if any. Without such evidence there is no support for any implied determination that plaintiffs' delay was reasonable.

That defendants were prejudiced by this delay is clear. Albert Harms who initially spoke with plaintiffs about the property; who was present when decedent came to California in 1977 and purportedly entered into the contract for $65,000; and who apparently had other conversations with plaintiff during this time period, died in 1982. Thus the only real evidence of what transpired between plaintiff and decedent and Mr. Harms was through plaintiff. Defendants were prejudiced by their inability to call a key witness in their

defense. (Getty v. Getty, supra, 187 Cal.App.3d 1159.) While defendants were able to call on Mr. Harms's son who was apparently present during some of the conversations, the son was not an active participant in these conversations. His testimony cannot be said to mitigate the prejudice to defendants.

Based on the total absence of explanation for plaintiffs' delay in bringing their action and the prejudice to defendants from the loss of critical evidence, the only conclusion reasonable is that plaintiffs' action for specific performance is barred as a matter of law.

STATUTE OF FRAUDS

Although we have determined laches bars plaintiffs from seeking specific performance, an equitable remedy, laches will not bar an action at law for damages for breach of contract. (County of Los Angeles v. City of Alhambra (1980) 27 Cal.3d

184, 195.) Thus the question remains whether plaintiffs, upon reversal, can pursue an action for breach of contract. This in turn depends on whether the trial court correctly determined defendants are estopped to assert the statute of frauds.[3]

The purpose of the statute of frauds is to prevent fraud and perjury with respect to certain agreements by requiring for enforcement the more reliable evidence of some writing signed by the party to be charged. (Riley v. Bear Creek Planning Committee (1976) 17 Cal.3d 500, 509.) Equity will not enforce an oral agreement within the statute of frauds solely because not to do so would permit a defendant to assert statute and thus avoid a parol obligation. (Beazell v. Schrader (1963) 59 Cal.2d 577, 582.)

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[3] Unlike laches, estoppel, including estoppel to assert the statute of frauds, may be raised in an action at law or one in equity. (City of Culver City v. State Bd. of Equalization (1972) 29 Cal.App.3d 404.)

In order for estoppel to apply there must be either unconscionable injury to plaintiff or unjust enrichment to defendant because of the plaintiff's performance or acts in reliance on the contract. (Monarco v. Lo Greco (1950) 35 Cal.2d 621.) "The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract [citations], or in the unjust enrichment that would result if a party who has received the benefits of the other's performance were allowed to rely upon the statute." (Id. at pp. 623-624.)

Not all injury caused by the seller's refusal to perform under oral contract is sufficient to cause an estoppel to assert statute of frauds. There must be unusual circumstances which give the injury or unjust and unconscionable character. (Goldstein v. McNeil (1954) 122 Cal.App.2d 608, 611.) However, a defendant may be estopped to assert the statute where he has permitted the other party, solely in reliance on such contract, to enter into possession of the realty and make valuable improvements thereon. (Quan Shew Yung v. Woods (1963) 218 Cal.App.2d 506; Frank v. Tavares (1956) 142 Cal.App.2d 683, 687.)

Whether a contracting party should be estopped to assert the statute of frauds is a question of fact, the determination of which, if supported by the evidence, will not be disturbed on appeal unless a contrary conclusion is the only one to be reasonably drawn from the facts. (Irving Tier Co. v.

Griffin (1966) 244 Cal.App.2d 852, 861.) In this case, we believe the only conclusion to be drawn from the facts as found by the trial court is defendants are not estopped to assert the statute of frauds.

First, it does not appear plaintiffs entered into possession or made improvements in reliance on any contract. The court specifically found that no contract was entered into until June of 1977. There is clearly substantial evidence to support this finding.

The record establishes and the court so found that the initial possession by plaintiffs was as tenants. Similarly, the record demonstrates that most of the improvements were done by plaintiffs before any contract was formed and were done at best with the expectation that plaintiffs would eventually be able to purchase the property. It cannot be said, however, that either the possession or the improvements

made before June of 1977 were in reliance on any contract.

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In Paul v. Layne & Bowler Corp. (1937) 9 Cal.2D 561, the court stated that part performance under Code of Civil Procedure section 1972 must relate to the transaction involved. (Id. at p. 564.) In that case it was clear plaintiff was not in possession of the property in reliance of the contemplated lease but rather was in possession under a

previous, expired lease and the performance related to that transaction. The court also determined that plaintiffs' performance would no support a finding of estoppel. (Id. at p. 565.) Similarly, we cannot uphold a finding that plaintiffs made improvements in reliance on the contract when the improvements were done before the contract was made.

Nor do we believe the improvements made after June of 1977 can be used to support estoppel as plaintiffs cannot establish that they made the improvements in reasonable reliance on the contract. As early as October of 1977 plaintiffs were put on notice that defendants did not recognize an existing contract between plaintiffs and decedent. At that time plaintiffs received a letter from Mr. Meyer stating his aunt and mother were considering plaintiffs' offer and were apparently putting the property on the market. Shortly thereafter, Hilda

Donahue specifically told plaintiff that she did not recognize any contract. While the court characterized these communications as merely an attempt by defendants to get out of the deal or raise the price and we do not dispute this finding, the fact remains that at that point plaintiffs did not act reasonably in making any additional improvements in reliance on the contract. Plaintiffs in essence acted at their own peril and cannot use these improvements as a basis to estop defendants from asserting that statute of frauds.[4]

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[4] Even if we were to assume any of the improvements were made in reasonable reliance on the contract, this alone is not sufficient to establish estoppel. Additionally, plaintiffs must establish that if defendants are allowed to assert the statute of frauds, plaintiffs will suffer an unconscionable injury or defendants will be unjustly enriched. Again we have difficulty in finding substantial evidence to support a finding in either regard.

There was no evidence that the improvements made by plaintiffs substantially or in any way increased the value of defendants' land. We cannot find defendants will be unjustly enriched if the

By finding that defendants are not estopped to assert the statute of frauds, we necessarily determine plaintiffs cannot seek damages for breach of contract. We do not determine, however, whether plaintiffs can state a cause of action and pursue tort damages. Plaintiffs were certainly encouraged by decedent to enter into possession and make improvements. Decedent, and apparently defendants also, knew plaintiffs were fixing up the house and the barn in the hope and belief that they would someday be the owner of the property. The court also found decedent's heirs and defendants knew plaintiffs and decedent had entered into a contract and tried to avoid the same by making false claims regarding the existence of the contract, decedent's

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contract is not enforced. Admittedly, plaintiffs incurred expense in fixing up the house and the barn but plaintiffs have had and will continue to have the benefit of these expenditures by being able to live on the property and use the property for a nominal rent.

authority and each other's authority to sell the land, all in an attempt to avoid the contract so as to be able to sell the land for a higher price. On these facts, plaintiffs may be able to pursue an action for tort damages or, at the very least, quantum meruit relief. (See, e.g., Paul v. Layne & Bowler Corp., supra, 9 Cal.2d at p. 565.)

EQUAL DIGNITIES RULE

Defendants raised a final contention that the court erred in finding the equal dignities rule did not apply. Because we find defendants are not estopped to assert the contract is invalid under that statute of frauds, it is unnecessary for us to reach this final contention.

DISPOSITION

Reversed.

NOT FOR PUBLICATION

/s/ Hollenhorst